91-1478 (1)

FILED
MAR 11 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

PARK ANDERSON, et al.,

Petitioners,

vs.

BOBBY BATTLE, et al.,

Respondents,

and

Intervenor,
UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUSAN B. LOVING
ATTORNEY GENERAL OF OKLAHOMA

SUE WYCOFF*
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF
FEDERAL and TORT DIVISION
420 West Main - Suite 550
Oklahoma City, Oklahoma 73102
(405) 521-4274

March, 1992 *Counsel of Record

QUESTIONS PRESENTED

On the single issue of racial equality in the prison system, the circuit court remanded this case for findings and conclusions "in accordance with Rule 52(a)." The district court made findings of fact supported by record citations and made conclusions of law. On a second appeal, without addressing the findings and conclusions in any way and without mention of Rule 52(a), the circuit court vacated the Order and Judgment of the district court and remanded again.

The questions presented are:

1. Whether the circuit court can simply ignore fully supported findings of fact and conclusions of law by the district court and remand the case again

without noting any error in the findings and conclusions.

2. Whether the district court's findings of fact are entitled to a presumption of correctness and ought to be reinstated.

LIST OF PARTIES

The parties to the proceedings below were:

Bobby Battle as the representative of the class of prisoners;

Park Anderson's successor as Warden of Oklahoma State Penitentiary, Dan Reynolds;

J. M. Sunderland's successor as Warden of Oklahoma State Reformatory, Steve Hargett;

Ned Benton's successor as Director of the Oklahoma Department of Corrections, Gary Maynard;

The present members of the Board of Corrections: William E. Beckman, Chairman; Phil Dessauer, Vice-Chairman; Calvino Samuel Muse, Sr., Secretary; Gregory H. Hall, Member; Hugh Reed, Member; James

Michael Stuart, Member; and Betty Sue Tow, Member;

The United States of America is an intervenor in this action; originally on the side of the Respondents and finally on the side of the Petitioners.

TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . .i,ii

LIST OF PARTIES iii

OPINIONS BELOW. 2

JURISDICTION 3

STATUTES INVOLVED . . . . . 4 & Appendix

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 8

I THE DECISION OF THE TENTH CIRCUIT, WHICH SUMMARILY VACATED THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT WITHOUT FINDING ANY ERROR IN THEM, IS A SERIOUS DEPARTURE FROM ACCEPTED PRACTICE, FROM THE DICTATES OF RULE 52, AND FROM THE PRECEDENTS OF THIS COURT 8

A. The Law 8

B. The Consequences 14

II THE 1989 OPINION OF THE DISTRICT COURT WAS CORRECT AND SHOULD BE AFFIRMED 22

A. The District Court's Actions 22

B. The Law 24

CONCLUSION 27

APPENDIX . . . . . Separate Volume

TABLE OF AUTHORITIES

Amadeo v. Zant
486 U.S. 214 1988) 9,10

American Hospital Assoc. v. Sullivan
938 F.2d 216 (D.C. Cir. 1991) . . . 11,12

Anderson v. Bessemer City
470 U.S. 564 (1985) 10,11,24

Battle v. Anderson
788 F.2d 1421 (10th. Cir. 1986) 5

Board of Education of Oklahoma City
Public Schools v. Dowell, 498 U.S. ____,
111 S.Ct. 630 (1991) 19

Daniels v. Essex Group
937 F.2d 1264
(7th. Cir. 1991 11,27

Dennison Mfg. Co. v Panduit Corp.
475 U.S. 809 (1986) 9

Icicle Seafoods, Inc. v. Worthington
475 U.S. 709 (1986). 9,13

Kilburn v. United States
938 F.2d 666 (6th. Cir. 1991). 11

Lockhart v. McCree
476 U.S. 162 (1986). 9

Maine v. Taylor
477 U.S. 131 (1986). 9,25

Murdock v. United States
951 F.2d 907 (8th. Cir. 1992). 11

Price v. Austin Independent School District, 945 F.2d 1307
(5th. Cir. 1991) 11

Pullman-Standard v. Swint
456 U.S. 273 (1982) 27

Quezada v. County of Bernalillo
944 F.2d 710 (1991) 12,20,21

Rodriguez-Morales v. Veterans Administration, 931 F.2d 980
(1st. Cir. 1991) 11

Rufo v. Inmates of Suffolk County Jail
___ U.S. ___, 112 S.Ct. 748
(1992). 19,20

Southside Fair Housing Committee v. City of New York, 928 F.2d 1336 (2nd. Cir. 1991) 11

United States v. Fidelity Capital Corp. 920 F.2d 827 (11th. Cir. 1991). 11,12

United States v. United States Gypsum 333 U.S. 364 (1948). 8,9,10

United States v. Yellow Cab Co. 338 U.S. 338 (1949) 25

Other Authorities

The Corrections Yearbook 16

Remarks by William Barr to California District Attorneys. 18

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 199

PARK ANDERSON, et al.,
Petitioner,

vs.

BOBBY BATTLE, et al.,
Respondents,

and

Intervenor,
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, Park Anderson and others, respectfully pray that a writ of certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit, entered in

the above-entitled proceeding on October 3, 1991.

OPINIONS BELOW

The December 13, 1991, Order of the Court of Appeals for the Tenth Circuit denying rehearing and rehearing en banc is reproduced in the Appendix, p. 63.

The October 3, 1991, Order and Judgment of the Court of Appeals for the Tenth Circuit is reproduced in the Appendix, p. 58.

The December 22, 1989, Opinion of the District Court for the Eastern District of Oklahoma is reproduced in the Appendix, p. 43.

The April 16, 1986, Opinion of the Court of Appeals for the Tenth Circuit which originally remanded the question of racial equal protection is published at

788 F.2d. 1421 and is reproduced in the Appendix, p.3.

JURISDICTION

This suit was originally brought in the United States District Court for the Eastern District of Oklahoma under 42 U.S.C. § 1983.

The particular portion of the case which is the subject of this Petition is an appeal decided by the United States Court of Appeals for the Tenth Circuit on October 3, 1991. Rehearing and rehearing en banc was sought and was denied on December 13, 1991.

The jurisdiction of this Court to review the judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULE INVOLVED

The Eighth Amendment to the United States Constitution; 42 U.S.C. § 1983; Rule 52(a) Federal Rules of Civil Procedure. These are reproduced in the Appendix, pp. 1 & 2.

STATEMENT OF THE CASE

This class action was brought in 1972 under 42 U.S.C. § 1983 claiming that unconstitutional conditions existed in Oklahoma prisons. In December 1983, after a nine day trial was held in September, the district court dismissed its continuing supervision over the Oklahoma prison system, finding that the system was constitutional, had been so since October 1982, and that there was no reasonable expectation that unconstitutional

conditions would recur. Battle v. Anderson, No. 72-95, Memorandum Opinion and Order, pp.7 & 8, (December 30, 1983).

The Respondents appealed. The Court of Appeals for the Tenth Circuit affirmed the dismissal and the cessation of supervision but, on the single issue of racial equality in the prison system, remanded for "such further proceedings as the district court deems proper" and for findings and conclusions "in accordance with Rule 52(a)". Battle v. Anderson, 788 F.2d 1421, 1425 (10th. Cir. 1986), Appendix p. 22. (The decision was rendered in 1986 but the mandate did not issue until May, 1989). Rehearing and rehearing en banc was denied.

On remand the district court asked both parties to submit those portions of

the record which they believed should form the basis of the findings of fact on the equal protection issue. The Petitioners filed proposed findings and conclusions with references to the trial transcript. The Respondents submission did not refer to the transcript, but instead relied only on the report of the fact finder.

Based on the submissions of the parties and its own earlier "exhaustive study and review of the record", (Memorandum Opinion cited above, p. 5) the district court entered findings of fact with references to the record and also entered conclusions of law. The district court concluded that the Petitioners' "expressed intent, practices, and policies are to prohibit and prevent invidious racial discrimination" and that they "have

not denied [Respondents] equal protection of law under the Fourteenth Amendment by racial discrimination."

Again, the Respondents appealed. This time, with no mention of Rule 52(a), and with no finding of any error on the part of the district court, a panel of the Tenth Circuit vacated the order of the district court and again remanded stating only, "[u]pon consideration of the record, the briefs, and the arguments of counsel, the order and judgment of the district court is VACATED." Again, rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE TENTH CIRCUIT, WHICH SUMMARILY VACATED THE FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT WITHOUT FINDING ANY ERROR IN THEM, IS A SERIOUS DEPARTURE FROM ACCEPTED PRACTICE, FROM THE DICTATES OF RULE 52, AND FROM THE PRECEDENTS OF THIS COURT.

A. The Law

Rule 52(a) of the Federal Rules of Civil Procedure plainly states that when an action is tried to the court without a jury the court shall make specific findings of fact and conclusions of law and those "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous."

This Court first addressed the Rule in United States v. United States Gypsum,

333 U.S. 364, 396 (1948), in which the Court declared that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The Court has written on the Rule some thirty times since Gypsum in cases involving, for example: patents, (Dennison Mfg. Co. v Panduit Corp., 475 U.S. 809 (1986)); the Rule's application in Fair Labor Standards cases, (Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986)); the commerce clause, (Maine v. Taylor, 477 U.S. 131 (1986)); death qualification of jurors, (Lockhart v. McCree, 476 U.S. 162, (1986)); procedural default in habeas corpus cases, (Amadeo v. Zant, 486 U.S.

214 (1988)); and sex discrimination under Title VII, (Anderson v. Bessemer City, 470 U.S. 564 (1985)). But the Court has never deviated from the meaning of clearly erroneous or from the appellate court's responsibility to acknowledge and apply Rule 52(a).

In Anderson v. Bessemer City, the Court quoted the definition of clearly erroneous from Gypsum and then wrote:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." [Citation omitted.] If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may

not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. [Citation omitted.]

***

This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v Bessemer City, 470 U.S. at 573-574.

Virtually all the Courts of Appeals recognize and apply the guidance given by this Court's opinions on Rule 52(a).[1]

---

[1]Rodriquez-Morales v. Veterans Administration, 931 F.2d 980 (1st. Cir. 1991); Southside Fair Housing Committee v. City of New York, 928 F.2d 1336 (2nd. Cir. 1991); Price v. Austin Independent School District, 945 F.2d 1307 (5th. Cir. 1991); Kilburn v. United States, 938 F.2d 666 (6th. Cir. 1991); Daniels v. Essex Group, 937 F.2d 1264 (7th. Cir. 1991); Murdock v. United States, 951 F.2d 907 (8th. Cir. 1992); United States v. Fidelity Capital

Indeed, the Tenth Circuit recognizes this jurisprudence as well, and sometimes applies it. In a case decided just one month before this case, Quezada v. County of Bernalillo, 944 F.2d 710 (1991), a panel of the Tenth Circuit which included two of the same judges who decided this case considered and discussed Rule 52 at some length. In Quezada the appellees argued that the court of appeals should apply a de novo standard of review. The court rejected that argument finding that "the policy behind Rule 52 strongly supports the clear error standard." Quezada v. County of Bernalillo, 944 F.2d at 715.

Corp., 920 F.2d 827 (11th. Cir. 1991); American Hospital Assoc. v. Sullivan, 938 F.2d 216 (D.C. Cir. 1991).

And yet, one month later, that same court summarily rejected and vacated all of the findings of fact and conclusions of law of the district court in this case with no mention at all of Rule 52 and with absolutely no discussion or analysis of either the findings of fact or the conclusions of law. This is precisely what the Court of Appeals for the Ninth Circuit did and what this Court found fault with in Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 713 (1986), in which this Court wrote: "[b]ut nowhere in its opinion did the court ever mention any of the factual findings of the District Court, much less discuss or analyze them."

The decision of the Tenth Circuit in this case is, therefore, in conflict not only with numerous decisions from the

other courts of appeal, it is also in direct conflict with this Court's precedents. In addition, the decision here - in such sharp contrast even with the Tenth Circuit's own earlier decision - represents a grave departure from the usual course of judicial proceedings.

B. The Consequences

The decision of the Court of Appeals is in conflict with the law. But perhaps even more important, it has serious social and policy consequences.

The effect of the Tenth Circuit's action is to vacate that portion of the district court's decision which dismissed continuing federal court supervision over the Oklahoma prison system on the question of racial balance and equality. The Oklahoma prisons have been found by both

the district court and the Tenth Circuit to be in compliance with the mandates of the Constitution since 1982. The district court dismissed this prison conditions suit and discontinued its supervision of Oklahoma's prisons in 1983. The Tenth Circuit affirmed that dismissal in 1986. Now, by its action in 1991, the Circuit has once again placed the Oklahoma prison system under federal court supervision on the issue of equal protection.

The effect of this on the State cannot be exaggerated. Now, when Oklahoma, like so many other states, is struggling to meet its fiscal and social responsibilities it is once again subject to the intervention of the federal courts in what ought to be its own prison operations. The resources of the Depart-

ment of Corrections as well as those of the Office of the Attorney General are once again focused on meeting the demands of Respondents' counsel on an issue which has been laid to rest twice already by the district court.

Nor is Oklahoma alone. There are many other states and local governments which have prison systems, or school systems, or other institutional systems operating under continuing federal court decrees.[2] If the Court of Appeals is permitted to substitute its judgment for

---

[2]The Corrections Yearbook reports that in January, 1990, there were 38 agencies throughout the United States under court orders concerning conditions of confinement, seven more than the previous year. In addition, there were 144 class action lawsuits pending in January, 1990. Corrections Yearbook, 1990, Criminal Justice Institute.

that of the district court without justification, any one of those systems might well be subject to active intervention from the federal courts again.

The Attorney General of the United States recently addressed this issue in remarks he made to the California District Attorneys Association. General Barr stated:

> I recognize that the ability of states to manage their own prisons has been hampered by the involvement of federal courts in the day-to-day operation of state facilities. The 70's and 80's saw a flood of litigation in the federal courts by state prisoners challenging prison conditions as "cruel and unusual punishment."
>
> ***
>
> In many cases, these rulings - which are still in effect - have substantially increased the

costs of constructing and operating new prisons, and made it difficult for the states to use their existing correctional facilities efficiently.

***

In my view, states should not be asked to operate under judicial decrees that in many instances were based on discredited legal theories and that impose unduly burdensome restrictions. We must allow state officials to exercise their lawful discretion.

***

The business of running prisons belongs to the appropriate state officials, not to federal judges and special masters.

***

The [Justice] Department should support termination in a timely manner of all litigation that limits the ability of a state to run its own prison facilities.

Excerpt of remarks by William P. Barr to the California District Attorneys

Association, Palm Springs, California, January 14, 1992.

This Court has spoken to the same effect in recent decisions. In both Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. ___, 111 S.Ct. 630 (1991), and Rufo v. Inmates of Suffolk County Jail, ___ U.S. ___, 112 S.Ct. 748, (1992), this Court has recognized that federal intervention and supervision of state or local systems should be subject to modification and to termination. The Court wrote: "the public interest and 'considerations based on the allocation of powers within our federal system' Dowell, 111 S.Ct., at 632, require that the district court defer to local government administrators, who have the 'primary responsibility for elucidating, assess-

ing, and solving' the problems of institutional reform." Rufo v. Inmates, 112 S.Ct. at 764. Those same considerations require that neither the district court in eastern Oklahoma nor the Court of Appeals in Denver should continue to supervise the Oklahoma prison system - even on the limited issue of equal protection.

In addition to the social and political concerns raised by the Circuit's action here, there are concerns about the finality and reliability of court decisions and about judicial economy. As the Tenth Circuit itself recognized in its Quezada opinion, "there is a 'public interest in the stability and judicial economy that [is] promoted by recognizing that the trial court, not the appellate

tribunal, should be the finder of the facts'." Quezada v County of Bernalillo, 944 F.2d at 715.

That public interest is certainly neither recognized nor served by the Circuit's action in this case. The district court has conducted a nine day trial and has twice determined that based on the facts presented there is no constitutional violation. The Court of Appeals, although it has found no fault with either the facts or the conclusion, apparently believes that it might have decided the issue differently and so has sent it back once again; and, in the process, has reinstituted federal supervision which has not existed for nine years. Under these circumstances, there is no finality to the district court's

judgment and there is certainly no judicial economy.

II

THE 1989 OPINION OF THE DISTRICT COURT WAS CORRECT AND SHOULD BE AFFIRMED.

A. The District Court's Actions

In September of 1983 the district court held a nine day trial in this matter. The transcript of that trial filled six volumes. In addition to the transcript of the oral testimony there were numerous documents and a 175 page report prepared by the court appointed fact finder. The district court had all of this evidence before it, and by its own statement made an exhaustive study of the material. Clearly, there was ample evidence from which the district court

could determine whether there was intentional racial discrimination in the Oklahoma prison system.

The court studied the evidence and concluded that it was sufficient and that no further hearings or evidence were needed. It then pointed out that, contrary to the court's order, the Respondents had neither supported their proposed findings of fact with citations to the record, nor had they supported their proposed conclusions of law with citations of authority. The court then made three pages of specific findings of fact, each one with a reference to the place in the transcript or the fact finder's report where it was supported. Following the fact findings, the court drew conclusions of law, again, each

supported by citations to authority, virtually all of it from this Court.

In short, the district court did exactly what is required by Rule 52 and what was mandated by the Court of Appeals.

B. The Law

This Court has made clear that "a finding of intentional discrimination is a finding of fact, [thus] the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a)." Anderson v. Bessemer City, 470 U.S. at 573. This is so whether the finding is based on testimony, on documentary evidence, or on physical evidence. Id at 574. This is so even if "the factual findings at issue may

determine the outcome of the case." Maine v. Taylor, 477 U.S. 131, 145 (1986). It is so whether the case concerns civil rights, (Maine), antitrust, (United States v. Yellow Cab Co., 338 U.S. 338 (1949), or nearly any other area of the law. And it is so even if the trial court adopts one party's findings of facts verbatim. (Anderson v. Bessemer City, cited above.)

Here, the district court did as commanded by Rule 52 and by the Court of Appeals and it found, as a matter of fact, that there was "no evidence of any policy or practice by defendants which deny plaintiffs equal protection of law due to racial discrimination as concerns housing or cell assignments. To the contrary, this court finds that the intent and purpose of defendant's policies is to

discourage and eliminate racial discrimination in regard to housing." (1989 Opinion, App. p. 47, Fact 4.) The court made similar findings on discrimination in dining facilities and job assignments. (Id., Findings 6 & 8.)

There is no indication from the Court of Appeals that there is any flaw in those findings. In fact, the Court of Appeals did not discuss, analyze, or even mention a single one of the district court's findings. There is no indication from the Court of Appeals that the district court misunderstood or misapplied the law to the facts. Again, the Court of Appeals did not address a single conclusion of law.[3]

---

[3]"If the trial judge correctly states the law, then his findings as to whether the facts meet the legal standard will be disturbed only if they are clearly

There is simply what appears to be a substitution of the Circuit Court's judgment for that of the district court. Such a substitution flies in the face of the express language of Rule 52 and of this Court's precedents. The substitution should be reversed, either after full briefing and argument or summarily, and the judgment of the district court reinstated.

CONCLUSION

The Court of Appeals ignored Rule 52(a), its own prior opinions, the opinions of its fellow circuit courts, and the precedents of this Court. In so doing, it resubmitted the Oklahoma prison

---

erroneous." Daniels v. Essex Group, Inc., 937 F.2d 1264, 1269 (7th Cir. 1991) citing Pullman-Standard v. Swint, 456 U.S. 273 (1982).

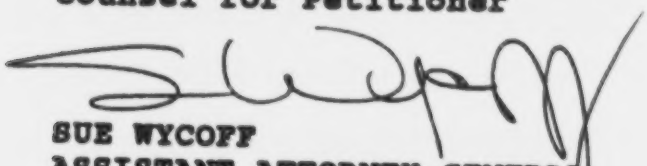
system to federal judicial control some nine years after that control was lifted; interfered with the delicate balance between state and federal power; and wrought havoc with the notions of finality of judgment and judicial economy.

The findings of fact and conclusions of law and the judgment of the district court are fully supported in the record of this case. They are correct and cannot be reversed because they are not clearly erroneous.

The Petitioners urge this Court to vacate the order of the Tenth Circuit, either after full briefing and argument or summarily, and reinstate the judgment of the district court.

Respectfully submitted,

SUSAN B. LOVING
ATTORNEY GENERAL OF OKLAHOMA
Counsel for Petitioner



SUE WYCOFF
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF FEDERAL & TORT DIVISION
420 W. Main, Suite 550
Oklahoma City, OK 73102
(405) 521-4274

COUNSEL OF RECORD

91-1478

Supreme Court, U.S.
FILED
MAR 11 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

PARK ANDERSON, et al.,

Petitioners,

vs.

BOBBY BATTLE, et al.,

Respondents,

and

Intervenor,
UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUSAN B. LOVING
ATTORNEY GENERAL OF OKLAHOMA

SUE WYCOFF*
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF
FEDERAL and TORT DIVISION
420 West Main - Suite 550
Oklahoma City, Oklahoma 73102
(405) 521-4274

*Counsel of Record

March, 1992

APPENDIX

Statutes Involved 1,2

1986 Opinion of Court of Appeals . . . 3

1989 Opinion of District Court 43

1991 Opinion of Court of Appeals . . . 58

1991 Denial of Rehearing 63

APPENDIX

The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 52(a) Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially a nd state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes ofreview. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed be the court. Findings of fact and conclusions of law are unnecessary on decision of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of the rule.

Bobby Battle, et al.,
Plaintiffs/Appellants,

v.
Park Anderson, et al.,
Defendants/Appellees,

and

United States of America,
Plaintiff/Appellee-Intervenor.

No. 84-1026

United States Court of Appeals,
Tenth Circuit.

April 16, 1986

The United States District Court for the Eastern District of Oklahoma, Frank Howell Seay, Chief Judge, entered judgment in ongoing litigation by prison inmates concerning conditions. Judgment found that system was constitutional, although there were four subjects of previous orders found to be inadequate and not in compliance, and granted motion to dismiss,

and inmates appealed. The Court of Appeals, Holloway, Chief Judge, held that: (1) evidence supported finding that access to courts was adequate; (2) court's findings regarding claims of racial discrimination were inadequate; and (3) evidence supported finding that conditions were not in violation of Eighth Amendment.

Affirmed in part; vacated and remanded in part.

Before **HOLLOWAY**, Chief Judge, and **BARRETT** and **DOYLE**, Circuit Judges.

HOLLOWAY, Chief Judge.

I

This § 1983 class action was initially commenced by inmate Bobby Battle, pro se, challenging various conditions of confinement at the Oklahoma State Penitentiary in 1972. The district

court held that conditions in the Oklahoma prison system violated the Eighth Amendment proscription against cruel and unusual punishment. The subsequent history of the controversy is detailed in the opinions cited in the margin.[1]

In April, 1982, the district court entered an order that defendants "should

---

[1]Since the district court held that conditions in the Oklahoma prison system violated the Eighth Amendment's proscription of cruel and unusual punishment in Battle v. Anderson, 376 F.Supp.402 (E.D.Okla.1974), the litigation concerning constitutional compliance has been ongoing. See Battle v. Anderson, 447 F.Supp. 516 (E.D.Okla.), aff'd, 564 F.2d 388 (10th Cir.1977); Battle v. Anderson, 457 F.Supp 719 (E.D.Okla. 1978), remanded for further hearings. 594 F.2d 786 (10th Cir.1979); Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980); Battle v. Anderson, 708 F.2d 1523 (10th Cir.1983) (per curiam), cert. dismissed, 465 U.S. 1014, 104 S.Ct. 1019, 79 L.Ed.2d 248 (1984); see also Battle v. Anderson, 541 F.Supp. 1061 (E.D. Okla. 1982) (award of attorneys' fees).

have and do hereby have the authority indefinitely but not permanently to double-cell where necessary," 708 F.2d 1523 at 1526, following increases in the Oklahoma prison population. In October, 1982, the district court issued an opinion following an evidentiary hearing on its orders that had previously been entered. The court stated that although it would not conclude from the evidence that the system had become unconstitutional in its operation, it was clearly in a state of decline. 708 F.2d at 1539. The court continued jurisdiction over the case to insure that the Oklahoma prison system did not revert to an unconstitutional condition. Id. The court ordered that a statement of penal policy and detailed plan of action be filed.

This court affirmed, one judge dissenting. Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983), cert. dismissed, 465 U.S. 1014, 104 S.Ct. 1019, 79 L.Ed.2d 248 (1984). The majority of the panel held that the district court did not abuse its discretion in continuing its jurisdiction to assure compliance with past decrees and to prevent a recurrence of unconstitutional conditions despite its finding that the system was then currently constitutional. Id. at 1537-40.

The instant controversy concerns events following that decision. In compliance with the district court's order, the State filed a detailed "Plan of Measures to be Taken to Assure Continued Constitutionality of Oklahoma's Prisons" in June, 1983, and in July the State filed

a supplement to the Plan. In September, 1983, the court held an evidentiary hearing on the State's Plan and the State's motion to dismiss the case. Judge Bohanon recused in December, 1983, and the case was assigned to Chief Judge Seay. Following review of a portion of the record, he entered the order on appeal herein on December 30.

The court concluded that "since October 1982 to the present date the conditions of confinement in the Oklahoma prison system are constitutional and are not cruel and unusual punishment." X Jt. App. 237. The court noted that there had been "disturbances, problems, and inadequacies in the Oklahoma prison system since the court's last findings." Id. at 235. The court noted that there were four

subjects of previous court orders still found to be inadequate and not in compliance - racial integration, access to the courts, equal protection guarantees for women, and vacating for human habitation the East and West Cellhouses of the Oklahoma State Penitentiary at McAlester. Id.

The court concluded nevertheless that the system was constitutional and "each area of continued violation has been specifically addressed by the State and is subject to a specifically planned remedy." Id. The court found that the State legislature and prison officials were aware of and sensitive to the constitutional requirements and that the court was satisfied "that there is no reasonable expectation that

unconstitutional practices will recur in the conditions of confinement in the Oklahoma prison system." Id. at 238. Concluding that it was mindful of its obligation to enforce the constitutional rights of all persons, the court granted defendants' motion to dismiss the case in its entirety. However, the court concluded that "[a]ll of this court's orders and injunctions as modified heretofore remain in full force and effect." Id. at 239.

In May, 1984, the district court denied a motion by plaintiffs to stay the dismissal order. Responding to a complaint that the judge had not had the full record to review, the judge noted that he had had four of seven transcripts from the September hearing for review

before entering the order; that he had all the transcripts containing plaintiffs' case-in-chief; and that he had earlier had the transcript volume with the testimony of the Governor and the Director of the Corrections Department. In denying the request for a stay, the court concluded that "[a]fter a careful review and study of the entire transcript, the court finds no reason to change its order of December 30, 1983, and the court reaffirms that order." Id. at 248. The court stated that "[a]lthough the court noted problems of compliance in certain areas, those areas were not held to be constitutional violations." Id. (emphasis in original).

On April 25, 1984, a panel of this court denied an application by the plaintiffs for a stay of the dismissal

order, pending appeal. On May 25, 1985, plaintiffs filed a further motion for a stay of the dismissal order, pending appeal, contending that the State was housing inmates in the East and West Cellhouses in violation of the district court's order of May, 1979. The state responded that the inmates were temporarily housed in those cellhouses on May 13, 1985, as a result of a disturbance at another State prison, and that the inmates were removed from them on May 28. Plaintiffs did not dispute these facts but did request that this court stay the dismissal order nevertheless. We denied the renewed application for a stay, stating that we would "consider the propriety and scope of the district court's December 30, 1983, order in our

disposition of the pending appeal in this cause." A motion to reconsider that ruling was filed, but in view of our disposition of the case the motion becomes moot.

We turn now to the appellate arguments challenging the correctness of the district court's order of dismissal.

II

Plaintiffs challenge the district court's holding that the prison system is constitutional. They argue that the system is unconstitutional with respect to access to the courts, racial integration, and equal protection guarantees for women - areas that the district court found to be "inadequate and not in compliance" with previous court orders. Plaintiffs also contend that the Oklahoma prison system,

considering the totality of the circumstances, is in violation of the Eighth Amendment.

A.

Access to the courts

[1] Plaintiffs attack the defendants' reliance on inmate law clerks to provide meaningful access to the courts.[2] Brief of Appellant 40-42; Reply Brief of Appellants 18-20. We have previously noted, however, that "[u]nder Bounds, the State is free to make a choice between affording law library facilities on a reasonable basis, or the alternative means of having available counsel on a

---

[2] The constitutional right of access to the court has been found to rest on the guarantees of the Due Process Clauses of the Fifth and Fourteenth Amendments. See Ward v. Kort, 762 F.2d 856, 858 (10th Cir.1985).

reasonable basis." Ward v. Kort, 762 F.2d 856, 860 (10th Cir.1985). The district court's dismissal order stated:

> The court finds that the mandated minimums of adequate library facilities has not yet been met. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1976). However, testimony from Mr. Larry Meachum, Director of the Department of Corrections of Oklahoma, at the September 1983 hearing, indicates and assures this court that libraries will be fully stocked and that plaintiffs have and will be assured continued access to courts.

X Jt.App.235. In this connection, the defendants' Plan stated that the State intended "to continue their current approach to access to courts by providing both law libraries and trained inmate law clerks to assist inmates in framing legal

issues for presentation to the court." X R. 113; See id. at 113-14.

There is record evidence that the Department of Corrections has a large or small library at each of the prison facilities. Inventories were admitted in evidence as Defendants' Exhibits 29, 30, and 31 respecting the major law libraries at the Oklahoma State Penitentiary, the Mabel Basset Correctional Center, and the Joseph Harp Correctional Center. V Jt.App. 1041. Each library has a supervisor. The fact finder appointed by the district court had found an "appalling lack of essential legal books and reference materials at both major and minor law libraries." VIII Jt. App. 119. However, we note that the inventories do list a substantial volume of basic

materials in the libraries. See, e.g., Defendants' Exhibit 29 (containing extensive listing of law books at Oklahoma State Penitentiary Library). Further, defendants' Plan represented to the court that "the Department is continually updating and supplementing its law library inventories." X Jt.App. 114[3]

In light of the testimony, the documentary evidence, and the representations accepted by the district

---

[3]In addition to the inventories of materials at the libraries, we note that the handbook "Civil Procedure for Inmate Legal Research Assistants" itself covered basic principles on federal habeas corpus with chapters on the exhaustion doctrine, procedural default, issues cognizable, pleadings, preliminary procedure, and evidentiary hearings. Statutory materials and summaries on various cases from the Supreme Court and the courts of appeals on habeas proceedings were also included.

court, we hold that the finding of the court that there was no constitutional violation in this respect is not in error.

B.

The claim of racial discrimination

[2] Earlier practices of racial discrimination in the Oklahoma prison system were chronicled in Battle v. Anderson, 376 F.Supp. at 410-11. In that opinion, the district court made conclusions of law on these practices, id. at 420-21, and entered orders designed to remedy the discrimination. Id. at 428-30. The State has endeavored since those orders to comply with the constitutional requirements.

In the instant proceeding there are numerous allegations of racial discrimination and segregation in the

Oklahoma prison system, including discrimination in job assignments, dining hall seating, and cell assignments. Numerous examples are contained in the fact finder's March 1983 final compliance report, VIII Jt.App. 25-43, and in the arguments and record citations in the briefs of the plaintiffs-appellants in this phase of the controversy. Brief of Appellants 15-16, 43; Reply Brief of Appellants 12-14. The State and the United States as intervenor argue that the evidence supports a finding of nondiscrimination. Brief of State Defendants-Appellees 101-02; Brief for the United States as Appellee 26-28.

In addition, the plaintiffs-appellants argue that the trial court did not address these issues in the December

30, 1983 order of dismissal. In that regard, we note that the district court did make the following findings and conclusions respecting this claim of racial discrimination:

> Racial integration of the occupants of double cells is found to be almost non-existent in the Oklahoma prison system. Racial integration of cells is strictly by voluntary action only. However, a commitment by defendants to fully integrate is contained in the Defendants' Plan. The court finds that the Defendants' Plan to be of sufficient remedial effect and has previously, in this order, approved and ordered its adoption.

X Jt. App. 235.

In view of the findings quoted above, we cannot agree with the plaintiffs-appellants that the trial court did not address the racial discrimination claim at all. Nevertheless, because of the several

distinct questions clearly raised by the fact finder's findings and the specific issues joined by the parties, we must agree that the findings of the district court are not sufficient under rule 52(a), Fed.R.Civ.P. We cannot perform our appellate function without adequate findings and conclusions by the trial court on this issue of fundamental constitutional importance. Battle v. Anderson, 614 F.2d 251, 256 (10th Cir. 1980); Squirtco v. Seven-Up Co., 628 F.2d 1086, 1902 (8th Cir.1980). Without expressing any view on the validity of the constitutional claim of racial discrimination, we hold that the findings and conclusions thereon are not sufficient due to the sharp conflict on the several claims of specific discriminatory

treatment not addressed by the trial judge.

Accordingly, with respect to this claim of racial discrimination, the judgment of dismissal must be vacated and the case remanded on that claim for such further proceedings as the district court deems proper. In view of the intervening time lapse it may well be desirable that further evidence on this claim be received. After the further proceedings which the trial court finds proper are held, the district judge should then find the facts specially and state separately his conclusions thereon in detail, dealing with the various claims of racial discrimination in accordance with Rule 52(a).

C.

The claim of sex discrimination

[3] Under the Equal Protection Clause, the plaintiff-appellants argue vigorously that women inmates in the Oklahoma prison system are subjected to discrimination in conditions of confinement, job assignments, training programs, mental and medical health services, and recreation. These were objections made by the plaintiffs to deficiencies in the fact finder's final compliance report. X Jt. App. 58-61. The specific claims arise from the fact that the State in a stipulation had agreed not to discriminate against inmates on various grounds, including sex, and had agreed further to provide equal access to various programs and work assignments. Brief of Appellants

22; Brief for the United States as Appellee 30 n. 22.

The district court's order of dismissal contains the following discussion of this issue:

> The court finds that equal protection guarantees for women inmates are inadequate in terms of programs, medical care, and exercise. However, Director Meachum testified there is a $62,000.00 current special appropriation for women's programs and detailed the specific remedies outlined in the Defendants' Plan. The court finds the proposed measures will continue constitutionality.

X Jt.App. 236.

With respect to the claim of violation of the Equal Protection Clause in the treatment of women inmates, we feel that the findings are not inadequate. The trial court specifically found inadequacies in terms of programs, medical

care, and exercise. We feel that the remaining claims of inadequate housing were thus implicitly rejected. Furthermore, the trial judge specifically identified the testimony which he credited, that of Director Meachum. His testimony concerning a $62,000 current special appropriation for women's programs was identified. Moreover, the court concluded that the program laid out by Director Meachum would be constitutionally sufficient. We note that Director Meachum's testimony explained the reason for not having an intermediate health unit for the Mabel Bassett facility in the Oklahoma City area. He pointed out that they had a psychiatrist assigned to the Mabel Bassett facility addressing the

mental health needs of women. VII Jt. App. 95-97.

On consideration of the evidence relied on by the plaintiffs, the evidence cited by the trial judge, and the resolve shown in the testimony of Director Meachum to solve the problem, we cannot say that the findings and conclusions of the trial judge on this constitutional claim were in error.

D.

The Eighth Amendment Claim

[4] Plaintiffs further vigorously challenge the findings and conclusions of the district court which rejected their claim that the totality of the circumstances in the Oklahoma prison system amounts to cruel and unusual punishment in violation of the prohibition

of the Eighth Amendment. More specifically, they seriously complain about overcrowding, food and kitchen facilities, ventilation, educational and training programs, medical and mental health services, and the occupation temporarily of the East and West Cellhouses at the Oklahoma State Penitentiary in violation of the May 4, 1979 order of Judge Bohanon.

In connection with this constitutional claim and the detailed complaints made, the district court's findings and conclusions against the plaintiffs were as follows:

> [T]he court finds that management problems exist in the Oklahoma system. Problem areas can be determined in food preparation and service, maintenance of equipment and facilities, distribution of

clothing and essential supplies, and inmate idleness. These management problems exist despite the extremely professional staff of the Oklahoma prison system. These problems are found to be primarily a direct result of increases in prison population.

Unfortunately, there will always be problems and inadequacies. We are considering a large, confined population of convicted felons, not a nursery school. As noted by Judge Barrett, "The Rhodes majority observed that harsh or restrictive conditions of confinement are part of the punishment criminal offenders justly receive because the Constitution does not mandate comfortable prisons. Justice Powell wrote that "To the extent that such conditions [of confinement] are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.' 452 U.S. [337] at p.347 [101 S.Ct. 2392 at p. 2399, 69 L.Ed.2d 59]." Battle v. Anderson, supra at page 1535.

The court finds, considering the totality of circumstances, these inadequacies, problems, and

> shortcomings do not constitute cruel and unusual punishment under the test of Rhodes. Rhodes v. Chapman, supra at page 347 [101 S.Ct. at page 2399]. The court finds no evidence at this time to show that the plaintiffs' present conditions of confinement in the Oklahoma prison system have changed from one of constitutionality to unconstitutionality. Thus, the court finds that since October, 1982 to the present date the conditions of confinement in the Oklahoma prison system are constitutional and are not cruel and unusual punishment.

X Jt.App. 236-37.

For reasons we will outline generally, from our review of the record testimony and exhibits, and from the arguments about the record evidence by plaintiffs, we conclude that the district court's findings were not clearly erroneous, that the conclusions drawn were supported by the findings and record, and

that the determination of the court to dismiss the cause in its entirety, retaining in full force and effect the prior orders and injunctions against constitutional violations, was not in error.

We have noted that there are specific complaints concerning conditions of confinement, including overcrowding, food and kitchen facilities, ventilation, educational and training programs, medical and mental health services, and the temporary occupancy of the East and West Cellhouses. See Brief of Appellants 4-22, 30-36. However, the ban on cruel and unusual punishment prohibits conditions that "involve the wanton and unnecessary infliction of pain, [or are] grossly disproportionate to the severity of the

crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981); see Whitley v. Albers, ___ U.S. ___, ___ ___ , 106 S.Ct. 1078, 1082-86, 89 L.Ed.2d 251 (1986). Although prison inmates may not be deprived of the "minimal civilized measure of life's necessities, . . . conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." Rhodes v. Chapman, 452 U.S. at 347, 101 S.Ct. at 2399.

A little over two years ago a panel of this court agreed that the overall conditions of the Oklahoma prison system

at that time were constitutional. Battle v. Anderson, 708 F.2d at 1533, 1537. We have considered the plaintiffs' complaints and the arguments in their briefs concerning the evidence in this subsequent case and are not convinced that the findings of the district court are clearly erroneous. The State defendants and the intervenor United States have persuasively argued that the evidence of record does not demonstrate conditions of confinement constituting cruel and unusual punishment under the strict standard of Rhodes v. Chapman. See Brief of Defendants-Appellees 2-88; Brief for the United States as Appellee 15-23.[4]

---

[4] The plaintiffs argue that they were denied due process when Chief Judge Seay entered his order of dismissal after having received only four of seven

We note one item in particular, the complaint that facilities at the Oklahoma State Penitentiary were not air-conditioned. The complaint concerning the heat was covered by the testimony of Mr. Hutto. The testimony was that the new housing units at the Oklahoma State Penitentiary were air-conditioned. IV Jt.App. 597. The East and West Cellhouses were not air-conditioned, but as discussed

---

transcripts of the hearing held earlier before Judge Bohanon. Judge Seay had before him at the time of his dismissal the transcripts of the plaintiffs' entire case in chief, among other things, and the testimony of Governor Nigh and Director Meachum, and the exhibits were apparently available, including those we have cited earlier concerning access to the courts. In addition, in his ruling a few months later on the motion to stay his order, which was denied, the judge stated that he had at that time reviewed the entire transcript of all the proceedings before Judge Bohanon.

below, they were vacated, except for limited emergency use, in compliance with the orders of Judge Bohanon.

With respect to the East and West Cellhouses, the May 4, 1979 order of Judge Bohanon was that the State no longer house inmates at those East and West Cellhouses due to the inadequate facilities there. In the dismissal order of December 30, 1983, the district court noted that the State was not in compliance with that order but was satisfied from the assurances of Director Meachum and Governor Nigh that the cellhouses would be vacated as soon as feasible. X Jt.App. 236.

On May 25, 1985, plaintiffs filed a motion for a stay pending appeal in this court stating that inmates were being

housed in the East and West Cellhouses in violation of the May 4, 1979 order. The State responded to that motion, representing that the inmates were placed in the cellhouses on May 13, 1985, as the result of a disturbance at another state prison and that the inmates were removed from these East and West Cellhouses on May 28. Plaintiffs did not challenge these representations.

There was a further motion for a stay filed December 27, 1985, in which the plaintiffs again represented that some inmates had been placed into the East and West Cellhouses. However, this was again related to a riot problem and the defendants informed the plaintiffs' counsel that the forty-three inmates housed in the East Cellhouse following the

riot were all removed by January 6, 1986. See Response of the United States to Appellants' Motion to Reconsider Order Denying Stay Pending Appeal 3. There was no dispute of those facts concerning the removal of the inmates from the East Cellhouse after the problem of temporary occupancy. We therefore conclude that the complaint concerning the East and West Cellhouses is not supported in our record, and we are not persuaded that these temporary emergency uses of the cellhouses should be held a constitutional violation.

In sum, we are not persuaded by the arguments of the plaintiffs and the evidence that the findings of the district court that there was no violation of the Eighth Amendment were clearly erroneous. In addition, we are not convinced that

there was an abuse of discretion by the district court in determining to dismiss the cause as he did, retaining in force and effect the prior orders and injunctions against constitutional violations.[5] The majority in Battle v.

---

[5] As noted, the district court here expressly stated that "[a]ll of this court's orders and injunctions as modified heretofore remain in full force and effect." X Jt.App. 239. This is in accord with the principle that "[i]t has long been settled that the court's power to grant injunctive relief survives discontinuance of the illegal conduct. E.g., United States v. W.T. Grant Co., 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 11303 (1952)." Battle v. Anderson, 708 F.2d at 1538 n.4. If the district court had intended any dissolution of the prior orders, its order "should have contained a definite provision for the dissolution" of those provisions. Tucker v. Baker, 185 F.2d 863, 865 (5th Cir. 1950). We are convinced that it is unmistakably clear that the orders and injunctions protecting the inmates against constitutional violations, as previously modified, were in no way intended to be relaxed and that they remain in full force and effect.

Anderson, 708 F.2d at 1537, concluded that "a court should exercise supervisory power over the suit until it can say with assurance not only that eighth amendment violations do not presently exist but there is no reasonable expectation that unconstitutional conditions will recur." In dealing with the various issues before him, the district judge concluded that he was satisfied that the defendants intended permanent compliance with constitutional conditions in the Oklahoma prison system. X Jt.App. 232, 234-37. The Memorandum Opinion and Order stated that "this court finds that it is now satisfied that there is no reasonable expectation that unconstitutional practices will recur in the conditions of confinement in the Oklahoma prison system." Id. at 238.

We are convinced that the district court's conclusion was based on findings supported by the record and that the determination to dismiss in these circumstances was not in error or an abuse of discretion.

III

As noted, there was a motion for a stay of the district court's dismissal order filed on May 25, 1985, by the plaintiffs. This court denied that motion, as noted, stating that we would consider the propriety and scope of the district court's December 30, 1983 order of dismissal in our disposition of the pending appeal. On December 27, 1985, the plaintiffs filed a motion to reconsider that order denying the May 25, 1985 motion for a stay. Because of the disposition we

are making in this opinion, we find that motion now to be moot.

In addition, on February 4, 1986, the plaintiffs filed a motion for partial remand for the district court to make an appropriate award of attorney's fees pendente lite. In view of the fact that this court was proceeding to disposition of the case, we have deferred a ruling on that motion. Since we are making a partial remand of the case, the plaintiffs will have the opportunity to have the district court consider a further application of attorney's fees when those proceedings on remand occur. The trial judge should entertain any such motion with those proceedings.

IV.

Accordingly, for the reasons stated we make the following determinations and order as follows:

1. The order of dismissal of December 30, 1983, by the district court, which retained in full force and effect the previous orders and injunctions protecting the rights of the plaintiffs against constitutional violations, is **AFFIRMED** except with respect to the claim of racial discrimination discussed in Part II-B of this opinion. The plaintiffs may by further proceedings in the district court seek relief from any violations of those previous orders and Injunction protecting their constitutional rights.

2. The order of dismissal of December 30, 1983, is **VACATED** with respect

to the claim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment; as discussed in Part II-B of this opinion, the cause is **REMANDED** to the district court for further proceedings and the entry of findings and conclusions by the district court on that constitutional claim as directed by this opinion.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Bobby Battle, et al., Plaintiffs,	)	
v.	)	**No. 72-095-C**
Park J. Anderson, et al., Defendants.	)	

OPINION

On December 30, 1983, this court dismissed plaintiffs' case in its entirety, finding that the defendants were in constitutional compliance. Defendants appealed that order. On May 22, 1989, the mandate of the United States Court of Appeals for the Tenth Circuit was filed in this court affirming this court's order of dismissal, except with respect to the claim of racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The Circuit Court remanded that portion of this

court's dismissal for additional findings of fact and conclusions of law. Battle v. Anderson, 788 F.2d 1421, 1429 (10th Cir. 1986).

In accordance with that opinion, and pursuant to Rule 52(a), Federal Rules of Civil Procedure, this court enters the following findings of fact and conclusions of law with respect to the plaintiffs' claim of racial discrimination:

Findings of Fact:

1. The court determines and finds that there is sufficient evidence in record from which to make findings of fact and determine the racial discrimination issue, such that additional hearings and evidence are not needed.

2. Contrary to this court's order of September 26, 1989, the court notes that

plaintiffs' attorney has neither attached nor made reference to testimony to support his proposed Findings of Fact, and plaintiffs' attorney does not cite any authority in his proposed Conclusions of Law.

3. The Fact Finder indicated, and others testified, that there was a relatively low number of racially mixed double cells. (J.A. Vol. VII, pp. 152-153, 161-162, and 213 - Alback testimony; J.A. Vol. V, p. 1029 - Douglas testimony; J.A. Vol. VII, p. 173 - Meachum testimony). The court finds this was a result of the defendants' initial policy of allowing all inmates to voluntarily choose cellmates. (J.A. Vol. V, p. 1029). Although the Equal Protection clause of the Fourteenth Amendment does not dictate the forcible

racial balancing of double cells, there was evidence that the defendants were attempting to racial balance double cells by mandatory cell assignments, beginning at the time the inmates first enter the system. J.A. Vol. V, p. 1031 - Douglas testimony; J.A. Vol. VI, p. 1275). The Fact Finder testified that defendants made improvements in racial balance, particular in housing units. (J.A. Vol. III, p. 428). The President-elect of the American Correctional Association, Terrell Hutto, testified that he had seen no segregated dorms in the system. (J.A. Vol. IV, P 655). Director Meachum testified that there was no intent or policy or practice of defendants to racially segregate inmates. (J.A. Vol. VII, p. 196).

4. This court finds no evidence of any policy or practice by defendants which deny plaintiffs equal protection of law due to racial discrimination as concerns housing or cell assignments. To the contrary, this court finds that the intent and purpose of defendants' policies and practices is to discourage and eliminate racial discrimination in regard to housing.

5. There was evidence of segregation in the dining halls at the McAlester facility. Again, this condition existed due to voluntary, self-imposed segregation by the inmates (plaintiffs), in that the inmates were allowed to sit and eat where they wished in the dining halls. (J.A. Vol. II, pp. 237-238; Vol. VI, p. 1191). In one instance, a guard directed a black

inmate from the dining hall containing white inmates to the dining hall containing black inmates. That inmate filed a grievance. The Warden testified that he wrote an executive memorandum to the effect that there would be no racial discrimination within the facility and anyone purporting to advocate such a thing would face disciplinary action. (J.A. Vol. VI, pp. 1159-1160 - Brown testimony). After this incident the defendants began to assign inmates to the dining halls by "runs", which are racially mixed, in order to better integrate the dining halls. (J.A. Vol. V, pp. 1159-1161 - Brown testimony; Vol. VII, p. 120 - Meachum testimony).

6. The court finds that the above dining hall grievance was an isolated incident,

and that there is no evidence of any policy or practice by the defendants which denies plaintiffs equal protection of law due to racial discrimination as concerns seating or eating assignments in the dining halls of the defendants' facilities. To the contrary, this court finds that the expressed intent and purpose of defendants' policies and practices to discourage and eliminate racial discrimination in regard to dining facilities.

7. There were allegations and some testimony of racial discrimination, principally between black and white inmates, in "desirable" job assignments. (J.A. Vol. II, p. 236 and Vol. III, p. 428 - Albach testimony). This was noted in situations where there were a small number

of positions available in an assignment, primarily at the unit level. However the Fact Finder testified that he believed the defendants were making progress in that area to eliminate discrimination, by Director Meachum's efforts in stressing the need to eliminate any vestiges of discrimination at the unit level through memos and staff meetings. (J.A. Vol. III, pp. 428-429 - Albach testimony).

8. The court finds that there is no policy, practice, or intent by defendants to discriminate racially in job assignments. The court finds that defendants are eliminating any vestiges of racial discrimination in job assignments by their expressed policy and intent to eliminate any racial imbalance in that area.

9. There have been some disturbances in which racial groups ban together to express their animosity toward another group or the institution. However, there is no evidence that such behavior is due to racial discrimination. Inmates of whatever race associate with others and groups of their own race to provide themselves with a support system and because it is human nature to do so, whether in a prison environment or in the free world. (J.A. Vol. II, p. 41 - Kamka testimony; Vol. VII, p. 129 - Meachum testimony). This court finds that such individual voluntary, self-imposed segregation by inmate plaintiffs is not racial discrimination by defendants which violates the equal protection clause of the Fourteenth Amendment.

10. The plaintiffs' expert witness, Gordon Kamka, testified that he did not find the defendants sanctioning or condoning racial discrimination or segregation. (J.A. Vol. II, pp. 82-83). This court agrees and so finds, and further, this court finds that it is the expressed policy, practice, and intent of defendants to discourage and eliminate any racial discrimination.

Conclusions of Law:

1. This court has jurisdiction and venue. 42 U.S.C. § 1983; 28 U.S.C. § 1391(b).

2. Inmates of penal institutions, such as plaintiffs herein, are protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment. Turner v. Safley,

482 U.S. 78, 84 (1986), citing Lee v. Washington, 390 U.S. 333 (1968).

3. A law, policy, or other official act is not unconstitutional solely because it has a racially disproportionate impact or effect. Evidence or proof of a racially discriminatory purpose or intent is necessary to sustain a denial of equal protection claim. Washington v. Davis, 426 U.S. 229, 239-245 (1975); see, Andrews v. Shulsen, 802 F.2d 1256, 1271 (10th Cir. 1986), note 11, wherein this Circuit, citing the Washington case, recognized that evidence of a discriminatory intent is required to prove a denial of equal protection; also, Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 273 (1978).

4. It is well recognized that the federal courts should accord deference to

the appropriate state prison authorities in the administration of prison affairs. Turner v. Safley, supra, at 84-85, citing Procunier v. Martinez, 416 U.S. 396, 405 (1974); Cruz v. Beto, 405 U.S. 319, 321 (1971).

5. This court certainly agrees with this Circuit that the pronouncement in Lee v. Washington, supra, "that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails", recognizes the principle that in the administration of prison affairs there may arise unusual situations in which security and discipline demand segregation for limited periods. United States v. Wyandotte

County, Kansas, 480 F.2d 969, 970-971 (10th Cir. 1973), cert. denied, 414 U.S. 1068. Like the United States Supreme Court in the concurring opinion of Lee v. Washington, supra, at 334, this court is "unwilling to assume that state or local prison authorities [defendants] might mistakenly regard such . . . pronouncement as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." (Emphasis added).

Pursuant to the above Findings of Fact and Conclusions of Law, this court having found no evidence of a racially discriminatory purpose or intent on the part of defendants, and having found, to the contrary, that the defendants' expressed intent, practices, and policies

are to prohibit and prevent invidious racial discrimination, the court finds that the defendants have not denied plaintiffs of equal protection of law under the Fourteenth Amendment by racial discrimination. Accordingly, plaintiffs' equal protection of law claims pursuant to the Fourteenth Amendment due to racial discrimination are denied and dismissed.

IT IS ALL SO ORDERED this 22 day of December, 1989.

(S) FRANK H. SEAY
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Bobby Battle, et al., Plaintiffs,	)	
v.	)	**No. 72-095-C**
Park J. Anderson, et al., Defendants.	)	

JUDGMENT

Pursuant to this Court's Order of Findings of Fact and Conclusions of Law filed herein on December 22, 1989, the court orders judgment entered for the defendants on plaintiffs' claim of denial of equal protection of law under the Fourteenth Amendment due to racial discrimination and judgment dismissing this case.

IT IS SO ORDERED this 8 day of **January, 1990.**

(S) FRANK H. SEAY
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BOBBY BATTLE, et al.,
Plaintiff-Appellants,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

v.

No. 90-7012
(E.D. Okla)
No. 72-95-CIV)
(D.C.)

PARK ANDERSON,his successor;RICHARD CRISP,Warden, Oklahoma State Penitentiary, and his successor;J.M. SUNDERLAND, Warden, Oklahoma State Reformatory, and his successor;DEPARTMENT OF CORRECTIONS;F.WARREN BENTON, Director, his successor, and the current;BOARD OF CORRECTIONS, STATE OF OKLAHOMA; FRANK E. CAREY, JR., President; LEROY KIRK; PATRICIA MONTGOMERY; GARY M. COOK; CHESTER T. CURTAIN; SETH MILLINGTON; WILLIAM R. THOMPSON,as members and their successors,
Defendants-Appellees.

Filed October 3, 1991

ORDER AND JUDGMENT

Bobby Battle, the class representative of inmates incarcerated in the Oklahoma State Penitentiary, appeals from the dismissal of his claim of a denial of equal protection under the Fourteenth Amendment because of racial discrimination.

Upon consideration of the record, the briefs, and the arguments of counsel, the order and judgment of the district court is **VACATED**. This case is remanded for a full evidentiary hearing concerning compliance at the present date by the Oklahoma Department of Corrections (DOC) with the existing orders and injunctions in this action concerning racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, see Battle v. Anderson, 376

F.Supp. 402, 428-30 (E.D. Okla. 1974); Battle, 457 F. Supp. 719, 739-40 (E.D. Okla. 1978), along with such further actions and orders in connection therewith or resulting therefrom as may be appropriate. The evidentiary hearing should focus on job assignments, but should also cover segregation in celling and dining, as well as other claims of discrimination.

This court is mindful of appellees' concern that forcible mixed race double celling, and other actions, could pose a security and management problem to the DOC. See Corrected Appellees' Answer Brief at 22. As three Justices noted in their concurrence to Lee v. Washington, "prison authorities have the right, acting in good faith and in particularized

circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." 390 U.S. 333, 334 (1968) (Black, J., concurring).* See also Turner v. Safley, 482 U.S. 78, 95 (1987) (prisoners retain those constitutional rights "not inconsistent . . . with the legitimate penological objectives of the corrections

---

* This court expresses no view as to whether the DOC has made or can make the showing necessary to satisfy Lee v. Washington. We also note that Lee held that invidious racial discrimination is as intolerable within a prison as outside except where essential to prison security and discipline. See Hudson v. Palmer, 468 U.S. 517, 523 (1984) (dictum).

system") (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)). However, "a vague fear on the part of the authorities that desegregation may result in violence . . . . is not enough." United States v. Wyandotte County, Kan., 480 F.2d 969, 971 (10th Cir.), cert. denied, 414 U.S. 1068 (1973).

JUDGMENT VACATED AND CASE REMANDED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BOBBY BATTLE, et al.,
Plaintiff-Appellants,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,
v.

No. 90-7012

PARK ANDERSON,his successor;RICHARD CRISP,Warden, Oklahoma State Penitentiary, and his successor;J.M. SUNDERLAND, Warden, Oklahoma State Reformatory, and his successor;DEPARTMENT OF CORRECTIONS;F.WARREN BENTON, Director, his successor, and the current;BOARD OF CORRECTIONS, STATE OF OKLAHOMA; FRANK E. CAREY, JR., President; LEROY KIRK; PATRICIA MONTGOMERY; GARY M. COOK; CHESTER T. CURTAIN; SETH MILLINGTON; WILLIAM R. THOMPSON,as members and their successors,
Defendants-Appellees.

ORDER
Entered December 13, 1991

BEFORE LOGAN, MOORE, ANDERSON,
Circuit Judges

This matter comes on for consideration of appellants' suggestion for rehearing en banc, which the court treats as a petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules

of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

(S) ROBERT L. HOECKER, CLERK

Supreme Court, U.S.
FILED
APR 13 1992
OFFICE OF THE CLERK

(3)

No. 91-1478

In The

Supreme Court of the United States

October Term, 1991

PARK J. ANDERSON, *et al.*,

Petitioners,

v.

BOBBY BATTLE, *et al.*,

Respondents.

and

UNITED STATES OF AMERICA,
Intervenor,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LOUIS W. BULLOCK*
PATRICIA W. BULLOCK
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3708
(918) 584-2001

Attorneys for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

ISSUES PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. The Petition for Writ of Certiorari should not be granted. The remand of the Tenth Circuit Court of Appeals requiring a trial court to make specific findings as to a state's compliance with orders requiring the desegregation of its prisons was in full accord with Rule 52 of the Federal Rules of Civil Procedure.

2. The Petition for Writ of Certiorari should not be granted. The remand of the Court of Appeals for factual findings as to a state's compliance with orders requiring desegregation of its prisons is in accord with the recent decisions of this Court in *Board of Education of Oklahoma City v. Dowell,* 111 S.Ct. 630, 112 L.Ed.2d 715 (1991), and *Freeman v. Pitts,* ___ U.S. ___, 1992 W.L. 59190 (1992).

PARTIES

The respondents accept the listing of the parties as presented by the petitioners with the exception of its reference to the United States as being an intervenor "on the side of the Petitioner." The United States intervened in this matter on March 15, 1973, pursuant to Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2. It raised in its complaint in intervention alleged segregation by race. These allegations were expanded to reach other issues on March 5, 1974. The United States has not participated in this matter since April 16, 1986, when the Court of Appeals issued its opinion ordering this case remanded for findings as to compliance. When last participating in this litigation, the United States participated as plaintiff-intervenor. *Battle v. Anderson*, 188 F.2d 1421, 1422 (10th Cir. 1986).

TABLE OF CONTENTS

Page

ISSUES PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW vi

JURISDICTIONAL ISSUES 2

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE NOT CITED BY THE PETITIONER .. 2

STATEMENT OF THE CASE 2

FACTS BEARING ON THE GRANTING OF CERTIORARI 2

SUMMARY OF ARGUMENT 16

ARGUMENT 17

I. THE COURT OF APPEALS DID NOT VIOLATE RULE 52 BY REMANDING THIS CASE FOR A FULL HEARING ON THE PLAINTIFFS' ALLEGATIONS ON NON-COMPLIANCE 17

II. THE REMAND BY THE COURT OF APPEALS IS IN ACCORD WITH THE RECENT DECISIONS OF THIS COURT 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Battle v. Anderson, 376 F.Supp. 402 (E.D. Okla. 1974) 5, 9, 12

Battle v. Anderson, 457 F.Supp. 719 (E.D. Okla. 1978) 5, 9

Battle v. Anderson, 594 F.2d 786 (10th Cir. 1979) 5

Battle v. Anderson, No. 72-95, slip op. (E.D. Okla. Oct. 12, 1982) 6, 15, 18, 20

Battle v. Anderson, 708 F.2d 1523 (10th Cir. 1983) ... 5, 6

Battle v. Anderson, 788 F.2d 1421 (10th Cir. 1986), *reh'g denied*, May 19, 1989 ..... 3, 5, 6, 7, 15

Battle v. Anderson, No. 90-7012, slip op. at 2 (10th Cir. Oct. 3, 1991), *reh'g denied*, Dec. 13, 1991 ..... 4, 7

Board of Education of Oklahoma City v. Dowell, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991)..... 17, 21, 22, 23

Columbus Board of Education v. Penick, 443 U.S. 449 (1979) 19

Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) 20

Freeman v. Pitts, ___ U.S. ___, 1892 W.L. 59190 (1992) 17, 22, 23

Green v. School Board of New Kent Co., 391 U.S. 430 (1968) 19

Rhodes v. Chapman, 452 U.S. 337 (1981) 6

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Rule 52, Federal Rules of Civil Procedure . . . 17, 18, 20, 23

Section 1, Fourteenth Amendment 2

Rule 15.2, Rules of the Supreme Court of the United States 2

CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974)

Battle v. Anderson, 447 F. Supp. 516 (E.D. Okla. 1977)

Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977)

Battle v. Anderson, 457 F. Supp. 719 (E.D. Okla. 1978)

Battle v. Anderson, 594 F.2d 786 (10th Cir. 1979)

Battle v. Anderson, No. 72-95, slip op. (E.D. Okla. May 4, 1979)

Battle v. Anderson, 614 F.2d 251 (10th Cir. 1980)

Battle v. Anderson, No. 72-95, slip op. (E.D. Okla. Oct. 12, 1982)

Battle v. Anderson, 708 F.2d 1421 (10th Cir. 1983), *cert. dismissed*, 465 U.S. 1014 (1984)

Battle v. Anderson, No. 72-95, slip op. (E.D. Okla. Dec. 30, 1983)

Battle v. Anderson, 788 F.2d 1421 (10th Cir. 1986), *reh'g denied*, May 19, 1989

Battle v. Anderson, No. 72-95, slip op. (E.D. Okla. Dec. 22, 1989)

Battle v. Anderson, No. 89-1079, slip op. (10th Cir. Oct. 22, 1991) unpublished, *reh'g denied*, Nov. 18, 1991

Battle v. Anderson, No. 90-7012, slip op. (10th Cir. Oct. 3, 1991) unpublished, *reh'g denied*, Dec. 13, 1991

No. 91-1478

In The

Supreme Court of the United States

October Term, 1991

PARK J. ANDERSON, *et al.*,

Petitioners,

v.

BOBBY BATTLE, *et al.*,

Respondents.

and

UNITED STATES OF AMERICA,
Intervenor,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the inmates of the Oklahoma Department of Corrections, respectfully pray that this Court deny Petitioner's Petition for Writ of Certiorari filed herein.

JURISDICTIONAL ISSUES

The respondents received a copy of the Petition for Writ of Certiorari on March 12, 1992, and this brief in opposition is timely filed as provided by Rule 15.2 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE NOT CITED BY THE PETITIONER

Other than the Constitutional provisions and statutes cited by the petitioner, respondents believe this case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

FACTS BEARING ON THE GRANTING OF CERTIORARI

The Court of Appeals for the Tenth Circuit has remanded this case for a hearing on the status of

compliance with orders which require the State of Oklahoma[1] to end racial segregation in its prison system. In order to avoid this review, the state has distorted the record in this case, suggesting that compliance with these orders is a long-settled matter which should escape further review. In spite of detailed testimony by a court-appointed Fact Finder of widespread and persistent violations of the desegregation orders, the district court has twice failed to make detailed findings as to the status of this compliance. With a twist of fact and logic, the state now attempts to block that review.

The pending petition for *certiorari* seeks to vacate the remand of the United States Court of Appeals for the Tenth Circuit. The remand over which review is sought is the second remand by the court of appeals following a hearing conducted in September 1983. The first remand, in 1986, required the trial court to examine the numerous allegations of continued violation of the court's orders as they related to racial discrimination and segregation. *Battle v. Anderson*, 788 F.2d 1421 (10th Cir. 1986), *reh'g denied*, May 19, 1989. The court of appeals also suggested, in light of the passage of time, that a hearing be held to update the record. *Id.* Upon remand, the trial court refused to hold an evidentiary hearing and failed to make

---

[1] The petitioners in this case are public officials of the State of Oklahoma who have been sued in their official capacities. These officials include the members of the Oklahoma Board of Corrections, the Director of the Oklahoma Department of Corrections and the Warden of the State Penitentiary and the Granite Reformatory, two of the largest prisons in Oklahoma. For ease of reference and clarity, they are referred to in this brief as the State of Oklahoma.

findings as to whether the state had complied with the orders to desegregate. Rather, it examined the 1983 record solely for evidence of a continuing intent to discriminate. The district court found no evidence of a discriminatory intent and ordered its oversight of defendants' compliance to end. A second appeal ensued. Again, the circuit court remanded the case, making the purpose of the remand explicit:

> This case is remanded for a full evidentiary hearing concerning compliance at the present date by Oklahoma Department of Corrections (DOC) with the existing orders and injunctions in this action concerning racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, *see Battle v. Anderson*, 376 F.Supp. 402, 428-30 (E.D. Okla. 1974); *Battle v. Anderson*, 457 F.Supp. 719, 739-40 (E.D.Okla. 1978), along with such further actions and orders in connection therewith or resulting therefrom as may be appropriate. The evidentiary hearing should focus on job assignments, but should also cover segregation in celling and dining, as well as other claims of segregation.

Battle v. Anderson, No. 90-7012, slip op. at 2 (10th Cir. Oct. 3, 1991), *reh'g denied*, Dec. 13, 1991. It is this remand for an evidentiary hearing which is now challenged before this court.

The issue of racial discrimination is one of nine different areas of prison operations originally tried before the Eastern District of Oklahoma in 1974. The court entered a detailed remedial order after finding violations in all nine areas. In addition to race, the court's order included access to courts, due process in disciplinary

procedures, use of chemical agents, medical care, correspondence rights, and religious freedom. *Battle v. Anderson*, 376 F.Supp. 402 (E.D. Okla. 1974). Later, the court entered remedial orders concerning conditions of confinement. *Battle v. Anderson*, 457 F.Supp. 719 (E.D. Okla. 1978).[2] All of the original orders remain in full force and effect.[3] *Battle v. Anderson*, 788 F.2d at 1428.

Contrary to petitioners' assertions, the state has never been found to be in compliance with the court's orders on desegregation, nor has the court of appeals "reinstituted federal supervision which has not existed for nine years." Petition for Certiorari at 21. In suggesting that the Oklahoma prison system has been found in constitutional compliance in 1982 by both the trial court and the court of appeals, the petitioners seriously overstate those findings, taking them out of context. Petition for Certiorari at 15. The issue litigated in 1982 did not deal with racial discrimination. The sole question was whether

---

[2] This order was appealed by the state. During the course of that appeal, the state conceded the unconstitutionality of the conditions in Oklahoma prisons and sought a remand for the limited purpose of requiring the district court to consider the state's proposals for remedying the admitted violations. *Battle v. Anderson*, 594 F.2d 786, 792 (10th Cir. 1979). On remand, the state presented a plan which closely resembled the district court's original order. The primary modification of the court's order was to allow the state additional time to comply.

[3] In the course of this litigation, the trial court vacated an order which required single celling. After repeated hearings regarding this part of the court's remedy, the court granted permission to the state to double cell indefinitely. *See Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983).

double celling in Oklahoma prisons was unconstitutional in light of *Rhodes v. Chapman*, 452 U.S. 337 (1981). The trial court found that the double celling did not create unconstitutional conditions but retained jurisdiction over that issue for fear of conditions reverting to their prior state. *Battle v. Anderson*, No. 72-95, slip op. (E.D. Okla. Oct. 12, 1982). Due to a finding of constitutionality with respect to double celling, the court of appeals split on the issue of whether jurisdiction should be retained on this limited issue. *Battle v. Anderson*, 708 F.2d 1523 (10th Cir. 1983). It is a major distortion of the Tenth Circuit's 1983 opinion concerning double celling and overcrowding to claim that any of that discussion bears upon the issue of racial discrimination. It is an equally grave distortion to suggest that the circuit court's recent remand reinstituted federal supervision after nine years.

Petitioners imply that the injunctions governing the state's conduct were lifted nine years ago – this is blatantly incorrect. Furthermore, asserting that the district court's 1983 decision dismissing court oversight on racial issues withstood appellate review is a misrepresentation. The court's injunctions have never been dissolved and the State of Oklahoma has never sought a vacation of the orders. The 1983 district court order ending court supervision specifically held, "All of this court's orders and injunctions as modified heretofore remain in full force and effect." *Battle v. Anderson*, No. 72-95, slip op. at 10 (E.D. Okla. Dec. 30, 1983). *See also, Battle v. Anderson*, 788 F.2d 1421, 1428 (10th Cir. 1986). Appendix to Petition for Certiorari at 37. The implication, with respect to racial discrimination, is even more misleading. The trial court's 1983 decision to end its active supervision of compliance

of the orders was reversed with respect to racial integration. *Battle v. Anderson*, 788 F.2d at 1428. The district court's second attempt to dismiss supervision was again reversed by the order petitioners now seek to have reviewed. *Battle v. Anderson*, No. 90-7012, slip op. (10th Cir. Oct. 3, 1991). Twice in nine years, the trial court has sought to end its active supervision over the state's compliance with its orders concerning racial discrimination. On each occasion, the trial court failed to find the state had complied with the court's orders. The Tenth Circuit properly has again remanded for review of compliance.

The State of Oklahoma has never sought modification or vacation of the injunctions entered to remedy *de jure* racial discrimination. The remand which the state now seeks to have reviewed does not involve the question of whether any of the injunctions should be lifted, but only whether the court should hold an evidentiary hearing to determine the present status of the state's compliance with orders dealing with racial segregation and discrimination before it changes its remedial process. The court of appeals has ordered the district court to make such a review.

The injunctions which the trial court has been ordered to review were entered to remedy *de jure* racial discrimination in the Oklahoma prison system. The original 1974 trial revealed wide and pervasive racial discrimination in the state penitentiary:[4]

---

[4] This case originally covered the Oklahoma Penitentiary and a system of prisons under its control. Later, after Oklahoma's prison system was consolidated into a single statewide system, the orders were extended to cover the entire state system.

Racial Discrimination and Segregation.

12. Prior to the July riot, the policy and practice at the Oklahoma State Penitentiary was to maintain a prison system segregated by race and by means of which black inmates were subjected to discriminatory and unequal treatment. Except for the maximum security unit, where inmates under disciplinary punishment were confined in single cells, all inmates were routinely assigned to housing units on the basis of race. The reception center, the mess hall, the recreation yard and barber facilities were racially segregated. Black inmates were discriminated against in job assignments and were subjected to more frequent and disparate punishment than white inmates. The guard force was and remains predominantly white. A policy statement issued by the Department of Corrections on October 20, 1972, declared the official departmental policy to be that all of its correctional facilities would be integrated in order to insure equal rights and equal opportunity to all persons confined therein. This policy statement also directed correctional administrators to formulate, implement and follow up procedures to insure that discrimination did not occur in practice. . . . Both the policy statement and accompanying operations memorandum were completely ignored by the Warden at the Oklahoma State Penitentiary at McAlester. Racial segregation, as had been practiced prior to the issuance of these directives, continued unabated. Not until the July riot did any noticeable changes occur. Only at that time, operating under emergency conditions, were inmates randomly lined up and ordered into cells. . . . [T]here is no present assurance that

> housing units will not become resegregated when normal operations are restored.

Battle v. Anderson, 376 F.Supp. at 409-10. The trial court then entered extensive remedial orders which the State of Oklahoma did not appeal.

In 1978, the trial court conducted an extensive review of the state's compliance with the orders covering racial discrimination and segregation, as well as other injunctions. *Battle v. Anderson*, 457 F.Supp. 719 (E.D. Okla. 1978). The court found wide-spread violations of these orders and continuing racial segregation. *Id.* at 731-732. Segregation in housing and discrimination in job assignments continued. As the trial court had feared, unconstitutional segregation in multi-occupancy cells had resumed. With respect to compliance at the Oklahoma State Penitentiary, the court found:

> In March 1974, individual cells at McAlester were integrated. The warden of McAlester was deposed on May 4, 1978. At that time, there were no integrated cells at McAlester out of approximately 400 multiperson cells. In August 1978, there were no integrated cells out of approximately 300 multiperson cells.

Battle v. Anderson, 457 F.Supp. at 731.

In March 1981, Judge Bohanon, the original trial judge, appointed a Fact Finder to assist the court in gathering facts relevant to the status of compliance on race, as well as the other issues where injunctions had been entered. In September 1983, a nine-day hearing was held on the status of compliance.

The Fact Finder reported widespread violations of the court's orders dealing with race. In spite of the court's orders enjoining job discrimination, the Fact Finder reported that job discrimination continued with the more desirable jobs being predominantly assigned to whites. For instance, at the Joseph Harp Correctional Center, the Fact Finder reported the following:

> At Joseph Harp Correctional Center, fourteen job categories were out of balance. Whites were over-represented in most desirable jobs such as library, clothing room, warehouse, canteen, Capital grounds crew, maintenance, chapel, inside orderlies, and orderlies for Units B & C. The explanation for imbalances are not credible. For example, the excuse given for the imbalance of white orderlies at Unit B is that this is a 'meritorious' dorm, implying a resultant lack of minorities to fill these positions. The fact is, however, that Unit B's population is racially balanced and there should be no difficulty balancing these job assignments. On the other hand, while whites seem to disproportionately fill the desirable positions, only minorities are assigned to the 'trash crew.'

Fact Finder's Report filed 4/1/83 at 62. While the seriousness of the problem varied from prison to prison, the pattern was the same.

> At the Stringtown Correctional Center, again the same deficiencies exist. Eleven job categories are out of balance. The explanation provided most often is that the imbalance is "due to inmates' skills and experience" and "by the request of the supervisor." These are not adequate explanations to justify the imbalances. The Court's

> order clearly states that skills and experience acquired in prison may not serve as a basis for selection of inmates for particular jobs or promotions if the preference would have a racially discriminatory effect; yet this type of excuse is often given for imbalances.
>
> At McLeod Correctional Center, the same pattern of discrimination was noted. There, many desirable jobs employ only a few inmates. In the great majority of cases, whites filled these positions. This same pattern was found at all of the other institutions. For example, working in the unit canteen is considered a highly desirable job at most institutions. A review of the latest racial balance reports indicates that these positions were filled by white inmates in all but two cases.
>
> At Mabel Bassett Correctional Center, the assignments to jobs employing large numbers of inmates were racially balanced, but assignments to some of the more desirable jobs employing just a few inmates were held primarily by whites. In addition, at Jess Dunn Correctional Center, an explanation given for imbalances was that "these are desirable positions which inmates request." The warden did indicate that, "Our staff will try to balance the other positions by the time the next racial analysis report is due at your office." The Fact Finder has, however, heard this refrain in too many reports, for too many years.

Id. at 61. Eight years after the court's order was entered, discrimination remained unabated.

In the weeks immediately preceding the hearing, the Fact Finder noted that the defendants had begun to make

some progress in job assignments, as well as in other areas. Transcript of 9/21/83 hearing at 928. Nonetheless, to achieve compliance, the Fact Finder recommended the Department of Corrections adopt a specific plan of action targeting these problems. Fact Finder's Report filed 4/1/83 at 63.

The defendants also have failed to eliminate the vestiges of segregation in housing. The court required that the defendants cease segregating multi-occupancy cells. This order arose out of the practice of assigning cellmates based on race. *Battle v. Anderson*, 376 F.Supp. at 410. The compliance measure for this order was to achieve integration of multi-person cells within four standard deviations of what would be expected if cell assignments were strictly at random. In 1983, the housing patterns revealed the continuing practice of routinely assigning only blacks to room with blacks and whites to room with whites. Fact Finder's Report filed 4/1/83 at 68-69.

In 1983, the Fact Finder found that there were 80 double cells at Conner Correctional Center. With random assignment within four standard deviations, there would be 21 to 39 mixed-race cells. *Id.* at 69. Instead, there were only five mixed black-white double cells.[5] *Id.* at 68-69. At Lexington Correctional Center, a medium security prison,

---

[5] In his report, the Fact Finder focused on the number of black-white mixed cells, concluding that the number of Indians and "others" is so small "that it did not affect the analysis." *Id.* at 68.

there were 101 double cells. Rather than the expected 31 to 51 mixed-race cells, there were none.[6] *Id.*

The defendants also failed to eliminate the vestiges of segregated housing units. At the time of the Fact Finder's Report less than half of the Oklahoma penal institutions' major housing units were racially integrated. Six out of the eleven prisons had failed to comply with the court order requiring housing units to be racially balanced within 10%. Fact Finder's Report filed 4/1/83 at 56-58. In addition to its failure to integrate housing units, the Department of Corrections also failed to meet their reporting requirements. *Id.* For example, the Oklahoma State Penitentiary's report for August 1982 reported full compliance with the court's goal of the racially balanced housing units. An analysis of the report, however, revealed seven housing units were actually out of balance. The same type of misreporting of compliance occurred at the Oklahoma State Reformatory, Mabel Bassett Correctional Center, and Ouachita Correctional Center. At the Lexington Prison, the report was resubmitted because of errors. The "corrected" report only represented housing 453 of 581 inmates assigned to Lexington. Fact Finder's Report filed 4/1/83 at 57-58. The Court's Fact Finder concluded the reports "were not being given serious attention". *Id.*

Other significant violations of the order were also shown to continue in 1983. In spite of orders to end racial segregation, the department operated segregated dining

---

[6] This racial imbalance is in spite of the fact that the inmates in those segregated cells came from racially integrated county jails. Transcript of 9/26/83 hearing at 1,031.

halls at the penitentiary. The segregation was reported by a black inmate who reported that a guard had ordered him out of the "white" dining hall. Transcript of 9/20/83 hearing at 238 (Fact Finder Albach). The warden responded by sending out a memo. At the hearing on compliance, the warden admitted the segregation of the dining hall continued despite the written policy to the contrary. Transcript of 9/26/83 hearing at 1,160 (Warden Brown). According to Director Meacham, the segregation continued for a long enough period of time that staff believed the dining halls were supposed to be segregated. Transcript of 9/29/83 hearing at 192 (Director Meacham). The segregation of the dining halls was finally stopped through the intervention of the Fact Finder. Transcript of 9/28/83 hearing at 1,191 (Warden Brown); and transcript of 9/21/83 hearing at 430 (Fact Finder Albach).

The 1983 evidence of continuing discrimination and non-compliance with the remedial orders went largely unchallenged. After hearing the evidence but prior to ruling, Judge Luther Bohanon recused himself and this case was reassigned to Judge Frank Seay, Chief Judge of the Eastern District. Three weeks after being assigned the case, Judge Seay ruled that the state was not in compliance with the orders requiring desegregation.[7] Nonetheless,

---

[7] The totality of the court's findings as to compliance with the orders on race read:

> There are four subjects of previous court orders that are still found to be inadequate and not in compliance: racial integration, access to courts, equal protection guarantees for women, and vacating to

(Continued on following page)

the court dismissed oversight of this as well as other areas. At the same time, he ordered: "All of this court's orders and injunctions as modified heretofore remain in full force and effect." *Battle v. Anderson*, No. 72-95, slip. op. at 10 (E.D. Okla. Dec. 30, 1983).

The plaintiff class appealed, challenging the end of court oversight. The state did not appeal. As was set forth, *supra*, the circuit court found that the trial court had not entered adequate findings relating to the allegations of non-compliance as to racial discrimination. *Battle v. Anderson*, 788 F.2d at 1425. Appendix to Petition for Certiorari at 18-22. The case was remanded.

On remand, the district court again failed to make findings regarding the allegations of non-compliance. Instead, the trial court examined the 1983 record for proof of an existing intent to discriminate. *Battle v. Anderson*, No. 72-95, slip op. (E.D. Okla. Dec. 22, 1989). Appendix to Petition for Certiorari at 43. The circuit court has again remanded this case, explicitly requiring a review of the

---

(Continued from previous page)

> human habitation the East and West Cellhouses of the Oklahoma State Penitentiary at McAlester, Oklahoma. . . .
>
> Racial integration of the occupants of double cells is found to be almost non-existent in the Oklahoma prison system. Racial integration of cells is strictly by voluntary action only.

Battle v. Anderson, No. 72-95, slip op. at 6 (E.D. Okla. Dec. 30, 1983).

state's compliance with the orders requiring desegregation of the prisons. It is from this remand, that the state has sought *certiorari*.

SUMMARY OF ARGUMENT

The elimination of racial discrimination and segregation as a matter of practice and policy from this state-operated prison system has been a daunting task. In the 1983 record of the state's compliance with the court's orders, the evidence of continued discrimination and segregation stands largely unchallenged. Housing remains segregated; whites continue to receive preferences for better jobs; and even as late as 1983, guards were found to be enforcing racial segregation in the dining hall at the penitentiary. These, as well as other vestiges of the segregated prison system which were found to exist in 1974, continue to exist in violation of the court's order.

In spite of the seriousness of these allegations, the plaintiffs and the court of appeals have been unable to secure an examination by the trial court of practices in Oklahoma prisons and to make factual findings adequate for review. The trial court has refused to enter findings which detail the extent to which the state has complied with the court's prior orders which required an end to segregation in the prison system. When the trial court most recently failed to examine compliance in its December 22, 1989 opinion, the court of appeals remanded with explicit directions for the court to examine the current status of the state's compliance with orders which have been in effect since 1974.

The charge that this remand is contrary to Rule 52 of the Rules of Civil Procedure and is contrary to the precedents of this Court cannot be sustained. The remand was in fact consistent with Rule 52. Rather than taking on the task of finding facts after a trial court had twice refused to make appropriate findings, the court of appeals again remanded the case to the trial court – this time with specific instructions to examine compliance with certain enumerated orders.

This remand is also consistent with the most recent decisions of this Court – *Board of Education of Oklahoma City v. Dowell,* 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) and *Freeman v. Pitts,* ___ U.S. ___, 1992 W.L. 59190 (1992). Both of these decisions require a trial court to look beyond protestations of good faith and to specifically examine the record of compliance before reducing oversight or modifying or vacating a court order. This is exactly the process which has been ordered by the court of appeals.

In light of the court of appeals' compliance with the rules, laws and procedures which govern this case, there are no grounds upon which the petition should be granted.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT VIOLATE RULE 52 BY REMANDING THIS CASE FOR A FULL HEARING ON THE PLAINTIFFS' ALLEGATIONS OF NON-COMPLIANCE.

The trial court wrote its most recent decision in this case, as if it were writing on a clean slate, its decision

ignored the official sanction of segregation woven into the history of the Oklahoma prisons. It seems that the court has already put away the volumes which chronicle the reasons why court orders had to be written to stop segregation in prison housing and to secure, regardless of race, fair consideration for preferred jobs. Even more distressing, the court refused to examine whether compliance with these orders had been achieved. Instead, the court looked at this case as a new case, where a practice of official segregation remained to be shown and where no orders had been entered.

The district court was seemingly oblivious of the fact that the inmate housing and employment had already been found to be racially segregated by policy and orders entered to change that system. Instead of focusing on whether those orders had been complied with, the court focused its inquiry upon whether there was a current policy of segregation. Finding none, the court dismissed its oversight. *Battle v. Anderson*, No. 72-95, slip op. (E.D. Okla. Dec. 22, 1989). Appendix to Petition for Certiorari at 43.

The court of appeals, in its remand, orders the court to refocus its attention. It requires the court to judge current actions of the state from the perspective of the history of the case and the orders entered. Petitioners' contention that the appellate court violated Rule 52 of the Federal Rules of Civil Procedure by remanding this case for a hearing and findings as to the state's compliance stands the process on its head. This assertion arises out of the bountiful confusion of the petitioners as to the obligations of the trial court once *de jure* discrimination had been found.

The trial court and the petitioners seemingly urge that after seventeen years under court jurisdiction, regardless of the state's actual compliance with the injunctions, proof of good intentions is sufficient to dismiss oversight. This simply is not the law. Once racial segregation was proven, those operating the system were "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."*Green v. School Board of New Kent Co.*, 391 U.S. 430, 437-438 (1968); *Columbus Board of Education v. Penick*, 443 U.S. 449, 458-459 (1979); *see also, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

With the finding that Oklahoma had created a segregated prison system, the issue for the trial court was whether the state had met its affirmative burden of eliminating the effects of its segregation.

> Each instance of a failure or refusal to fulfill this affirmative duty continues this violation of the Fourteenth Amendment.

Columbus Board of Education v. Penick, 43 U.S. 449, 459 (1979) (White, J.) and *Green v. School Board of New Kent County*, 391 U.S. 430, 437-38 (1968). At this stage of the litigation, the focus of the inquiry is not simply whether the officials have abandoned their discriminatory purpose.

> [T]he measure of the post-*Brown I* conduct . . . under an unsatisfied duty to liquidate a dual system, is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system. . . . As was

> clearly established in *Keys* and *Swann*, the Board had to do more than abandon its prior discriminatory purpose.

Dayton Board of Education v. Brinkman, 443 U.S. 526, 538 (1979) (White, J.).

Following the finding of *de jure* discrimination, the law requires the court look beyond the mere intent of the state officials – it must determine whether the state has effectively eliminated the segregation. In its 1986 opinion, the court of appeals remanded this matter to the district court for findings and recommended the trial court hear evidence as to the present state of compliance with the court orders. Despite the fact that by the time the district court addressed the case, the trial record was seven years old and had been heard by another judge, the trial court refused to hold a hearing.

In its review of this seven year old record, the trial court persisted in not examining the state's compliance with its orders. The trial court entered findings as to the state's intent. The trial court did not find that the dual system had been eliminated nor did the trial court find that the state had complied with the court's orders. It failed to make the findings which are at the heart of its inquiry at this stage. *Battle v. Anderson*, No. 72-95, slip op. (E.D. Okla. Dec. 22, 1989). The 1991 remand by the circuit court sets out in specific detail the findings which the trial court needs to make and orders the trial court not to rely on a decade old record but instead to review present compliance. The remand of the circuit court does not violate Rule 52 of the Federal Rules of Civil Procedure. Requiring the trial court to make such determinations is precisely what the Rule envisions.

II.

THE REMAND BY THE COURT OF APPEALS IS IN ACCORD WITH THE RECENT DECISIONS OF THIS COURT.

On two recent occasions, this Court has examined the record in two school desegregation decisions to determine, among other things, the scope of the inquiry necessary before a trial court can vacate or modify a desegregation decree. Contrary to the petitioners' assertions, those rulings do not sanction the mere finding of abandonment of intent as sufficient grounds for eliminating oversight. The Tenth Circuit's remand is clearly in accord with the Supreme Court's recent rulings.

In *Board of Education v. Dowell*, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991), the Court examined the circumstances under which desegregation orders in a school case could be modified or dissolved. In *Dowell*, the Western District of Oklahoma found current segregation was not caused by a policy of the school board and held the previous injunctive decree should be vacated. The court of appeals reversed and remanded. This Court accepted *certiorari* to examine the evidentiary burden necessary to secure the vacation of a desegregation decree. In remanding for a hearing, the Court instructed the trial court as to the issue to be tried.

> A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation decree, a school board's compliance with previous court orders

> is obviously relevant. . . . The District Court should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.

Dowell, 112 L.Ed.2d at 729. This is exactly the inquiry which the Tenth Circuit sought in its initial remand in 1986 and now has explicitly instructed the trial court to make. It is the obvious question of "have they complied" which remains to be answered. Certainly, the Tenth Circuit cannot be faulted for directing the trial court to make this inquiry.

More recently, this Court reiterated the issues which need to be reviewed when a trial court is considering reducing oversight. In *Freeman v. Pitts*, ___ U.S. ___, 1992 W.L. 59190 (1992), this Court examined the question of the scope of a trial court's discretion to reduce the scope of its oversight, while still controlling some aspects of a defendants' operations. This is analogous to the trial court in this case ending its active supervision while leaving its injunctions in place. *Freeman* clearly instructs as to the scope of the inquiry which is necessary before a court begins to disengage:

> Among the factors which must inform the sound discretion of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether

> the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law, and the constitution that were the predicate for judicial intervention in the first instance. In considering these factors, a court should give particular attention to the school system's record of compliance.

Id. at 15. The court of appeals has remanded this case for a review of the very issues required by *Freeman*.

The Tenth Circuit's remand is consistent with the decisions of this Court. The district court has been asked to review the state's compliance with the orders. This inquiry is mandated by *Dowell* and *Freeman*. A remand for this review does not provide an issue for *certiorari*.

CONCLUSION

There is no issue in this case at this time which warrants a grant of *certiorari*. The appellate court has ordered nothing other than a full hearing and findings of the status of compliance based on that hearing. This remand is in full compliance with the decisions of this Court and Rule 52 of the Federal Rules of Civil Procedure.

Respectfully submitted,

LOUIS W. BULLOCK*
PATRICIA W. BULLOCK
BULLOCK & BULLOCK
320 South Boston, Suite 718
Tulsa, Oklahoma 74103-3708
(918) 584-2001

Attorneys for Respondents

* Counsel of Record